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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ADOLF MEYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in the enforcement of the First Amendment a federal appellate court may refuse to review pictures of nude post-adolescent males not portraying sexual activity as obscene or lewd because the defendant stipulated to the sufficiency of the obscenity in a non-jury trial?

2. Whether a defendant may be punished consecutively for the specific violation of importing sexually explicit material (18 U.S.C. 2252(a)(1)) and the general violation of importing "contrary to law" (18 U.S.C. 545)?

3. Whether a federal court may use uncharged criminal misconduct in violation of state and foreign law as the principal basis in imposing the sentence for a federal law violation and whether Due Process requires that the punishment fit the crime charged?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Adolf Meyer, requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in **United States v. Adolf Meyer.**

OPINION BELOW

The opinion of the Court of Appeals

affirmed the conviction and sentence of the petitioner and is officially reported at 802 F.2d 348 (9th Cir 1986). A copy of the opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On 14 October 1986 the Court of Appeals entered judgment affirming the conviction of the petitioner for importing lewd and obscene photographs in violation of federal law. On 25 February 1987 his petition for rehearing and suggestion for rehearing en banc was denied. (Appendix B). This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2252(a)(1):

> Any person who knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct.

18 U.S.C. 2255(2):

"[S]exually explicit conduct" means actual or simulated ... (E) lascivious exhibition of the genitals or pubic area of any person.[1]

18 U.S.C. 545:

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law....

STATEMENT OF THE CASE

Both violations (18 U.S.C. 2252(a)(1) and 545) were based on the stipulation presented at the non-jury trial. The stipulation consisted of 13 photographs found in the possession of the petitioner when he crossed the Mexican border into the United States. The 13 photographs were of young males, one 15 and one-half and the other seventeen and one-half years old. Each photo shows a single male nude or in a state of partial undress. There is no touching,

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[1] The petitioner was charged with the pre-1984 amendment language: "lewd exhibition of the genitals or public area."

fondling, or activity with the genitals.

The district court had original jurisdiction pursuant to 18 U.S.C. 3231. Jurisdiction in the Court of Appeals was based on 28 U.S.C. 1291.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE REFUSAL OF THE FEDERAL COURT OF APPEALS TO REVIEW THE OBSCENITY OF THE MATERIALS THAT WERE THE BASIS OF CONTESTED LITIGATION WAS A JUDICIAL ABANDONMENT OF THE FIRST AMENDMENT AND VIOLATED THE PRECEDENT OF THIS COURT.

Although trial defense counsel agreed to the sufficiency of the obscenity of the pictures submitted to the court pursuant to the stipulation, the trial judge made an express finding of "sexually explicit conduct, specifically a lewd exhibition of the genitals" as to Section 2252(a)(1) violation "obscene" as to the Section 545 violation (RT 136)[2].That judgment was

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[2] The district court followed the language of the indictment. No analysis was done under **Miller v. California**, 413 U.S. 15 (1973) or **New York v. Ferber**, 458 U.S. 747 (1982). The petitioner received the 10-

subject to review by the federal court of appeals for the sufficiency of the evidence in a criminal case. **Jackson v. Virginia**, 443 U.S. 307 (1979)(a rational fact finder based upon the evidence of record must find proof beyond a reasonable doubt); **Smith v. United States**, 431 U.S. 291, 305-306 (1977).

In speaking of the responsibility of reviewing courts in these cases, Justice Brennan in **Jacobellis v. Ohio**, 378 U.S. 184, 190 (1964) stated:

> Hence we reaffirm the principle that, in "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional

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year maximum sentence under Section 2252 and the 5-year maximum, consecutively, under Section 545. On 13 April 1987 the district modified the 15-year term by suspending it and placing the petitioner on 5 years probation. The petitioner, a permanent resident but a German national, was taken into custody of the Immigration and Naturalization Service and has been order excluded from the United States. Since the petitioner is under a suspended 15-year sentence, this Court retains jurisdiction. **United States v. Campos-Serrano**, 404 U.S. 293, 294 n.2 (1971).

judgment on the facts of the case as to whether the material involved is constitutionally protected. (Emphasis added.)

In **Cote v. United States**, 413 U.S. 915 (1973), this Court reversed an obscenity conviction based on a plea of guilty and remanded to the court of appeals in light of **Miller v. California**, 413 U.S. 15 (1973), and other precedent.[3] Recently, in **Bose Corp. v. Consumers Union**, 466 U.S. 485 (1984), this Court stated the duty of review as to both the issue of obscenity (**Miller**) and sexually explicit material involving minors (**Ferber**):

Similarly, although under **Miller v. California**, 413 U.S. 15 (1973), the question of what appeals to "prurient interest" and what is "patently offense" under the community standard obscenity test are

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[3] In **Cote**, the Court of Appeals as a matter of law refused to refuse the issue of obscenity because the defendant had pled guilty. 470 F.2d 755, 756. **Clique v. United States**, 514 F.2d 923, 927 (5th Cir. 1975), commenting on **Cote**, found a constitutional obligation for an "independent assessment" of the alleged obscene material.

"essentially questions of fact," id. at 30, we expressly recognized the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," id. at 25. We have therefore rejected the contention that a jury finding of obscenity vel non is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations govern. In **Jenkins v. Georgia**, 418 U.S. 153, 159-161 (1974), based on the independent examination of the evidence -- the exhibition of a motion picture -- the Court held that the film in question "could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way...." Id., at 161. And in its recent opinion identifying a new category of unprotected expression -- child pornography- the Court expressly anticipated that an "independent examination" of the allegedly unprotected material may be necessary "to assure ourselves that the judgment ... 'does not constitute a forbidden intrusion on the field of free expression,'" **New York v. Ferber**, 458 U.S. at 774, n. 28

The photographs in the personal possession of the petitioner were not obscene. In **Spinar v. United States**, 440 F.2d 1241, 1242 (8th Cir. 1971), the court reversed a conviction involving photos of the male genital area:

The materials in question consist of

advertisements for 2' by 3' posters as well as the posters themselves. The subject matter depicted are nude or nearly nude males, all with their genitalia fully exposed. Most of the pictures show a single male, some portray more than one male. There is no sexual activity shown although in some of the pictures the male organ appears not to be in the state of complete repose. There is certainly no attempt by photographic artistry to shade or blur the genital area.

As to the Section 2252 violation, these photographs of a single postpubertal male not depicting any sexual activity cannot be characterized as child pornography. See **New York v. Ferber**, 458 U.S. 747, 774-775 (1982)(photos of 12-year-old boys masturbating held sufficient).

If the parties in a non-jury trial stipulated to the centerfold of **Playboy** as obscene and lewd, the Court of Appeals would have refused to review it. That decision conflicts with the precedent of this Court and the Fifth Circuit.

II. THE "CONTRARY TO LAW" PROVISION OF 18 U.S.C. 545 APPLIES EQUALLY TO 18 U.S.C. 2252(a)(1) SO THAT TWO OFFENSES MERGED FOR SENTENCING.

Section 545, paragraph two, prohibits merchandise "imported or brought into the United States contrary to law." This generic federal statute does not specify which law. The violation of Section 2252 arising out of the same factual transaction of bringing in 13 photos would be "contrary to law." The prosecutor chose to use 19 U.S.C. 1305, which declares obscene material to be subject to forfeiture, as the target offense of the Section 545 violation, but such prosecutorial construction does not create a separate offense from a generic statute when Congress has specifically created Section 2252. The circuit court never addressed the other specific statute prohibiting the importation of obscene materials (18 U.S.C. 1462), which is also a potential predicate for the Section 545 "contrary to law" violation. The Congressional scheme did not intend the general statute on importation to

give rise to additional separate offenses so as to permit multiplication of sentences.

This Court in **New York v. Ferber**, supra, created a lesser included standard of obscenity because of the involvement of minors. In **Ferber**, the defendants had been acquitted of the obscenity charges, but convicted under the state child pornography laws. 458 U.S. 747, 752. This court upheld that conviction, but the question now presented is whether the defendants could be convicted of both obscenity and minor[4] pornography. The same facts were used for each offense, but the elements of the offense are the same, except for the level of non-protected First Amendment expression. The circuit court held the obscenity requirement of Section 545 different than the "sexually explicit conduct" with minors

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[4] Federal law extends minor pornography to include any person under the age of 18 years. 18 U.S.C. 2255(1).

of Section 2252. Both involved the same element, but a different quantum of proof. These offenses did not permit separate consecutive punishment, but merged. The Section 2252 violation (lesser standard) merged into the Section 545 violation (greater standard).

III. THE PUNISHMENT IMPOSED BY A FEDERAL COURT MUST FIT THE CRIME FOR WHICH THE PETITIONER WAS CONVICTED AND NOT PUNISH FOR OFFENSES POTENTIALLY PUNISHABLE BY STATE AND FOREIGN AUTHORITIES.

The petitioner was charged with bringing in obscene and lewd photos, but the sub silentio charges were the aggravation introduced at sentencing that the petitioner had homosexual relations with the two male youths in the photos and possibly others. The acknowledged homosexual contacts[5]

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[5] The prosecutor noted that the petitioner acknowledged sexual contact with three boys (SRT 7), but she claimed there was more in light of the body dimensions in his notebook and the number of photographs (SRT 7). One young male was 15 1/2 years, another was 17 1/2 years, but the age of third male was unknown.

occurred in Arizona, California, and Mexico. Such conduct is proscribed by the states who could have initiated charges against the petitioner, but did not[6]. The federal district court used the federal offenses as an open-ended punishment umbrella to sanction for possible state offenses rather than limit punishment to the charged federal offenses.

The petitioner recognizes the right of the district court to be fully informed about the offense and the offender (**Williams v. New York**, 337 U.S. 241 (1949), but the imposition of the maximum punishment directed at his homosexual contacts with

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[6] Under California law the maximum penalty for oral copulation with a minor over 14 but under 18 years is a prison term of three years. Cal. Penal Code section 288a(b)(1) and (2). California also has a criminal law for bringing matter depicting sexual conduct into the state punishable by a maximum of three years confinement, but requires an intent to distribute or exhibit. Cal. Penal Code section 311.2(d). The California statute has an express exemption if the child under the age of 18 is "legally emancipated." Cal. Penal Code section 311.2(f).

youths was improper, and the penalty should have been tailored by the judge's broad discretion to the offenses for which he had been convicted.

"A criminal sentence must be proportionate to the crime for which the defendant has been convicted." **Solem v. Helm**, 463 U.S. 277, 290 (1983). The imposition of a 15-year sentence of imprisonment[7] for the bringing into the United States was disproportionate, because the district court did not limit its concern for punishment to the convicted offense.

CONCLUSION

Because of the significant constitutional questions relating to obscenity and sentencing, this Court is requested to issue a writ of certiorari to

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[7] The petitioner had served approximately 26 months confinement, before being granted probation on a motion to reduce sentence. See note 2, **infra**. The 15 year sentence is still in effect, but suspended.

review this conviction. In the alternative, it is requested that certiorari be granted, the judgment vacated, and the case remanded to the court of appeals to conduct the review required by **Miller v. California**, 413 U.S. 15 (1973) and **New York v. Ferber**, 458 U.S. 747 (1982).

Respectfully submitted,

DATED:24 April 1987

John J. Cleary
Attorney for
Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ADOLF MEYER,
Defendant-Appellant.

No. 85-5219
D.C. No.
84-0663-01-JLI
OPINION

Argued and Submitted
May 6, 1986—Pasadena, California

Filed October 14, 1986

Before: James R. Browning, Anthony M. Kennedy and Robert R. Beezer, Circuit Judges.

Opinion by Judge Kennedy

Appeal from the United States District Court
for the Southern District of California
J. Lawrence Irving, District Judge, Presiding

SUMMARY

Criminal Procedure/Criminal Sentencing

Appeal from convictions and sentencing. Affirmed.

This action arises from appellant Meyer's conviction for transporting in foreign commerce visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(1), and importing obscene photographs in violation of 18 U.S.C. § 545 and 19 U.S.C. § 1305. Meyer was sen-

tenced to the maximum term of imprisonment on each count. The sentences are consecutive.

[1] This court rejects the government's threshold contention that the only issues properly before this court are those related to the sentence. [2] Meyer's first appeal was still pending when the second appeal was filed. [3] Nevertheless, this court declines to review the obscenity of the photographs. The district judge conducted an extended colloquy with Meyer to ensure that he was familar with the stipulation and understood its consequences. In Meyer's presence, defense counsel reiterated that the stipulation was that the photographs were obscene.

[4] This court rejects Meyer's argument that his conviction under section 545 violated his privilege against self-incrimination. Meyer was convicted of importing the photographs not failing to declare them. [5] This court also rejects Meyer's contention that the photographs cannot constitute merchandise because he did not intend to use them for commercial purposes. This court has held that merchandise under section 545 includes items intended for personal use.

[6] In light of the stipulated facts and the statute under which Meyer was convicted, the potential harm posed by Meyer's pedophilia was a proper subject of the sentencing proceeding. [7] Though the judge's remarks taken in isolation might suggest a predisposition to impose the maximum sentence regardless of the evidence, the record shows the judge adequately considered and weighed the testimony as to the treatability of Meyer's pedophilia. [8] The record reflects a permissible and reasonably considered judgment that there was not a great enough likelihood of successful treatment to warrant a sentence other than the maximum. The sentence was harsh but not improper. [9] The district judge was not required to reconcile Meyer's sentence with the sentences that other courts have imposed on other defendants. [10]

Finally, as each statute required proof of an element that the other did not, consecutive sentences were permissible.

COUNSEL

Cleary & Sevilla, John J. Cleary, San Diego, California, for the defendant-appellant.

Joan Weber, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

OPINION

KENNEDY, Circuit Judge:

On June 30, 1984, customs agents searched appellant's vehicle at the San Ysidro border crossing between Mexico and the United States and found thirteen photographs of the genitals of fifteen and seventeen-year-old boys. Appellant was charged in a superseding indictment with one count of transporting in foreign commerce visual depictions of minors engaging in sexually explicit conduct, 18 U.S.C. § 2252(a)(1) (Supp. 1984), and one count of importing obscene photographs in violation of 18 U.S.C. § 545 and 19 U.S.C. § 1305. The trial was without a jury and on stipulated facts. The district court found appellant guilty and sentenced him to the maximum term of imprisonment on each count, ten and five years respectively. The sentences are consecutive. We affirm the convictions and the sentence.

[1] We reject the government's threshold contention that the only issues properly before us are those related to the sentence. When the district judge entered the judgment of conviction at the conclusion of the stipulated facts trial, he tentatively imposed the maximum sentence pending a sen-

tencing study pursuant to 18 U.S.C. § 4205(c). Appellant filed a timely notice of appeal, *see* Fed. R. App. P. 4(b), but later moved to dismiss the appeal. Some time after the motion for dismissal was filed, the sentencing study was completed and the district court affirmed the original sentence. Appellant then timely filed a second appeal which is the appeal before us. The government argues that the motion to dismiss the first appeal forecloses review of the conviction in this second appeal. We disagree.

The government's reliance on *Corey v. United States*, 375 U.S. 169 (1963), is misplaced. *Corey* holds that where, as here, a defendant is convicted and tentatively sentenced pending a sentencing study, he may appeal in either of two ways. First, the defendant can immediately appeal the conviction and then separately appeal the sentence when the study is completed and final sentence imposed. Second, the defendant can wait until the final sentence is imposed and then challenge both the conviction and the sentence in one appeal. *Id.* at 173-74 & n.15. Though *Corey* makes clear that a defendant who elects the former option is not entitled to two appeals on the merits of his conviction, *id.* at 174 & n.15, *Corey* does not address the pertinent question of the scope of the second appeal where the first appeal is dismissed without reaching the merits.

[2] It is true that the Tenth Circuit in *Jack v. United States*, 341 F.2d 273 (10th Cir. 1965), construed *Corey* to foreclose review of the conviction in the second appeal where the first appeal is dismissed without objection from the defendant. *Id.* at 275. However, even assuming we were to follow *Jack* on its facts, that case is distinguishable. In *Jack* the motion to dismiss the first appeal was granted several months before the final sentence was imposed and the second notice of appeal filed. Here, in contrast, appellant's motion for dismissal was not granted until *after* the sentence was final and the second notice of appeal was filed. Thus appellant's first appeal was still pending when the second appeal was filed. The govern-

ment does not explain why the subsequent dismissal of the first appeal should limit the scope of the second. Appellant is not precluded from challenging his conviction in the appeal before us.

[3] Nevertheless, we decline to review the obscenity of the photographs. In the district court, appellant and his counsel signed a written stipulation that the photographs were obscene. At the stipulated facts trial, the district judge conducted an extended colloquy with appellant to ensure that he was familiar with the stipulation and understood its consequences. *See United States v. Miller*, 588 F.2d 1256, 1264 (9th Cir.) (trial judge should ensure that stipulation is voluntary), *cert denied*, 440 U.S. 947 (1979). The judge informed appellant of the maximum sentence he faced and appellant indicated he was willing to proceed with the stipulated facts trial. In appellant's presence, defense counsel reiterated that the "stipulation on my part and Mr. Meyer's" was that the photographs were obscene. There is no indication that the stipulation was involuntary or that the defendant was unaware of its contents. Consequently, appellant is bound by the stipulation. *See United States v. Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981). To the extent appellant asserts that his attorney's decision to concede obscenity constituted ineffective assistance of counsel, his contention rests on facts not developed on this direct appeal and he is free to pursue the contention in a collateral proceeding under 28 U.S.C. § 2255. *United States v. Kazni*, 576 F.2d 238, 242 (9th Cir. 1978); *see United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984) ("customary procedure in this Circuit for challenging the effectiveness of defense counsel in a federal criminal trial is by collateral attack on the conviction under 28 U.S.C. § 2255"), *cert denied*, 105 S. Ct. 1772 (1985).

[4] We reject appellant's argument, raised for the first time on appeal, that his conviction under 18 U.S.C. § 545 violated his privilege against self-incrimination. Appellant was con-

victed of importing the photographs, not of failing to declare them. The indictment charged appellant under the second paragraph of 18 U.S.C. § 545, which proscribes "knowingly import[ing] or bring[ing] into the United States, any merchandise contrary to law . . . ." The indictment referred to 19 U.S.C. § 1305, which prohibits the importation of obscene articles. As appellant was not charged with failing to declare the photographs, no self-incrimination issue presented here.

[5] We reject appellant's next contention, also raised for the first time on appeal, that the photographs cannot constitute "merchandise" within the meaning of 18 U.S.C. § 545 because he did not intend to use them for commercial purposes. The argument is meritless, as we have held that "merchandise" under section 545 includes items intended for personal noncommercial use. *United States v. Hall*, 559 F.2d 1160, 1165 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978). Appellant's intended use of the photographs is irrelevant.

Appellant also argues for the first time on appeal that Count I of the indictment charging violation of 18 U.S.C. § 2252 did not give him adequate notice of the crime charged, because it stated that the photographs depicted "lewd" exhibition of the genitals, while the statute in effect when appellant committed the crime required "lascivious" exhibition. 18 U.S.C. § 2255(2)(E) (Supp. 1984). We reject appellant's contention as we fail to see how the wording of the indictment impaired his defense. *See United States v. Pheaster*, 544 F.2d 353, 363 (9th Cir. 1976), *cert. denied sub nom. Incisio v. United States*, 429 U.S. 1099 (1977). The statute was amended from "lewd" to "lascivious" shortly before appellant committed the crime, *see* 18 U.S.C. § 2253(2)(E) (1982) (former version of section 2255, renumbered and amended May 21, 1984), and as appellant concedes, the legislative history suggests that the amendment was only "technical." H.R. Rep. No. 536, 98th Cong., 1st Sess. 8, *reprinted in* 1984 U.S. Code Cong. & Ad. News 492, 499. Appellant does not seriously suggest that he was confused as to the charges he had to meet, *see Pheaster*,

544 F.2d at 363, and under the circumstances the indictment's correct citation to the statute was adequate to inform that lasciviousness was an element of the crime, *see United States v. Coleman*, 656 F.2d 509, 511-12 (9th Cir. 1981).

We next turn to appellant's contention that his fifteen-year sentence is unduly harsh. Our authority to review a sentence is narrow. *United States v. Hall*, 778 F.2d 1427, 1428 (9th Cir. 1985). A sentence within the statutory limits is generally not reviewable. *United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986). Though appellant suggests the maximum sentence was unwarranted, imposition of the maximum term of imprisonment does not in and of itself trigger appellate scrutiny. *United States v. Barker*, 771 F.2d 1362, 1367 (9th Cir. 1985).

[6] The trial judge took extensive testimony on the characteristics and recidivist tendencies of pedophiles, and the argument on appeal seems to be that the judge drew erroneous conclusions from that testimony and was unduly influenced by it. We find no error here. The statute under which appellant was convicted was intended to combat the sexual exploitation of minors. S. Rep. No. 438, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 40, 42-43 (legislative history of the Protection of Children Against Sexual Exploitation Act of 1977 (current version at 18 U.S.C. §§ 2251-55 (Supp. 1984))). Though appellant was sentenced on counts pertaining to transporting and importing the photographs, it was stipulated that he took the pictures himself and engaged in sex acts with the minors involved. The district judge gave weight to testimony that the young victims of pedophiles may suffer severe psychological and emotional injury, and may become pedophiles themselves. In light of the stipulated facts and the statute under which appellant was convicted, the potential harm posed by appellant's pedophilia was a proper subject of the sentencing proceeding.

[7] Appellant contends that certain comments by the district judge reflect a failure to consider the evidence and were

tantamount to an automatic imposition of the maximum sentence, violating the principle that the judge must exercise his discretion so that sentencing is directed to the individual before the court. *Barker*, 771 F.2d at 1364-65; *see Dorszynski v. United States*, 418 U.S. 424, 443 (1974); *United States v. Lopez-Gonzales*, 688 F.2d 1275, 1276 (9th Cir. 1982). The district judge ordered a sentencing study under 18 U.S.C. § 4205(c) to determine whether appellant's pedophilia was treatable. When the judge ordered the study, he cautioned appellant against harboring "false hope" of receiving a sentence less than the maximum. The judge indicated he would impose the maximum sentence if the study left open "any kind of chance that [appellant] is going to repeat and molest any other young boys." When the study was completed, the judge stated that "there is no 100 percent guarantee if treatment is engaged in that this defendant will not repeat." Though the judge's remarks taken in isolation might suggest a predisposition to impose the maximum sentence regardless of the evidence, the record shows the judge adequately considered and weighed the testimony.

[8] Appellant is wrong that the district judge mechanically imposed the maximum sentence and ignored overwhelming evidence in favor of the likelihood of successful treatment. Though the defense expert Dr. Schwartz estimated there was a good probability of successful treatment for appellant, he stressed that accurate predictions in individual cases are difficult. The district judge weighed Dr. Schwartz's estimate, noting that it contradicted the earlier testimony of William Dworin, a police specialist who opined that the likelihood of successful treatment is low. Detective Dworin had investigated between 1,200 and 1,500 child molestation cases, and the district judge stated on the record that Dworin was a well-qualified witness because of his background. It is true that Dr. Friedman, who conducted the study under section 4205(c), also estimated the probability was high that appellant, if treated, would cease his sexual activity with minors. The district judge, however, considered Dr. Friedman's report and

discredited it on the ground that Dr. Friedman had never treated pedophiles. Further, Dr. Friedman's report stated that appellant's criminal record which included sexual offenses weighed against successful treatment, and the district judge expressly considered appellant's criminal record at the sentencing proceeding. The record reflects a permissible and reasonably considered judgment that there was not a great enough likelihood of successful treatment to warrant a sentence other than the maximum. The sentence was harsh but not improper.

[9] Appellant also argues that his sentence violates the Supreme Court's ruling in *Solem v. Helm*, 463 U.S. 277 (1983), that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.* at 290. Appellant submitted to the district judge a consultant's report purporting to show that defendants convicted of committing "lewd or lascivious acts with child under age 14" in violation of California Penal Code § 288 (West Supp. 1986) typically are sentenced to relatively short terms of imprisonment. Appellant also brought to the district judge's attention at least one federal case, *United States v. Hale*, 784 F.2d 1465 (9th Cir. 1986), in which a defendant convicted under 18 U.S.C. §§ 545 and 2252 was fined and sentenced to a probationary term. *Hale*, 784 F.2d at 1471 n.4. Appellant argues that the district judge was required under *Helm* to harmonize appellant's sentence with the sentences imposed under the same or related offenses in state court and in other federal courts. We disagree. In *Helm* the Supreme Court acknowledged the trial judge's discretion to impose a sentence within permissible statutory limits. *Helm*, 463 U.S. at 290 & n.16. In a post-*Helm* case, we stated that a district court "is not required to harmonize its view of appropriate sentencing with that of other district courts . . . ." *Barker*, 771 F.2d at 1367. Because individual circumstances may vary from one offender to another, persons convicted of the same crime need not receive similar sentences. *Hall*, 778 F.2d at 1428. The district judge was not required to reconcile appellant's

sentence with the sentences that other courts have imposed on other defendants.

Finally, appellant argues that it was improper to impose consecutive rather than concurrent sentences. Appellant does not dispute that the district judge's sentencing discretion extends to the decision whether to impose consecutive sentences. *United States v. Miller*, 650 F.2d 169, 170 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981). Appellant's contention is that double jeopardy principles forbid consecutive sentencing under 18 U.S.C. § 545 and 18 U.S.C. § 2252.

[10] The test to determine if two statutory offenses may be punished cumulatively is whether each statute requires proof of a fact that the other does not. *Albernaz v. United States*, 450 U.S. 333, 337-38 (1981) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). When two statutes are not the same offense under the *Blockburger* test, it is presumed that Congress did not intend to preclude multiple punishment. *Missouri v. Hunter*, 459 U.S. 359, 367 (1983); *Albernaz*, 450 U.S. at 340. Here, each statute required proof of an element that the other did not. Section 545 requires that the importation be "contrary to law," and the indictment referred to 19 U.S.C. § 1305, which prohibits the importation of obscene pictures. Thus, appellant's conviction under 18 U.S.C. § 545 required that the photographs be obscene. In contract, section 2252 does not refer to obscenity, and the legislative history makes clear that obscenity is not required. H.R. Rep. No. 536, 98th Cong., 1st Sess. 7, *reprinted in* 1984 U.S. Code Cong. & Ad. News 492, 498. Section 2252 requires that the photographs depict minors, an element not present in 18 U.S.C. § 545 and 19 U.S.C. § 1305. As each statute required proof of an element that the other did not, consecutive sentences were permissible.

Appellant's convictions and sentence are AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ADOLF MEYER, Defendant-Appellant.	No. 85-5219 D.C. No. 84-0663-01-JLI ORDER FILED: FEBRUARY 25, 1987

Appeal from the United States District Court for the Southern District of California

Before: BROWNING, KENNEDY, and BEEZER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

APPENDIX B

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

No. 86-1747

In the Supreme Court of the United States

OCTOBER TERM, 1986

ADOLF MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to review the obscenity of photographs that petitioner, at trial, had stipulated were obscene.

2. Whether petitioner's consecutive sentences for transporting in foreign commerce visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. (Supp. III) 2252(a)(1), and for importing obscene photographs, in violation of 18 U.S.C. 545 and 19 U.S.C. 1305, violated the Double Jeopardy Clause.

3. Whether petitioner's consecutive sentences were disproportionate to his offenses.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1747

ADOLF MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 802 F.2d 348.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1986. A petition for rehearing was denied on February 25, 1987 (Pet. App. B). The petition for a writ of certiorari was filed on April 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts, petitioner, a resident alien, was convicted of transporting in foreign commerce visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. (Supp. III)

2252(a)(1), and of importing obscene photographs, in violation of 18 U.S.C. 545 and 19 U.S.C. 1305. Petitioner was sentenced to ten years' imprisonment on the first count and five years' imprisonment on the second, the terms to run consecutively. The court of appeals affirmed (Pet. App. 1-10). On April 13, 1987, the district court suspended the entire sentence and placed petitioner on five years' probation. The Immigration and Naturalization Service subsequently ordered petitioner excluded from the country.

1. The evidence at trial, as stipulated to by petitioner, showed that on June 30, 1984, petitioner crossed from Mexico into California and presented himself for inspection at the San Ysidro port of entry. Petitioner was driving a pickup truck with a camper attached and was accompanied by a 15-year-old boy. A Customs Service inspector, upon searching the vehicle, found a binder containing numerous photographs, most of which depicted young males in various nude poses and one of which showed petitioner engaged in oral sex. Petitioner stated that he had picked up the 15-year-old boy four or five months earlier while the youth was hitchhiking near his home in Holbrook, Arizona. Since that time petitioner and the boy had been traveling together. The boy had at first refused to engage in sexual relations with petitioner, but after a week petitioner had persuaded him to do so, and thereafter petitioner continued to have sexual relations with the boy. The 15-year-old identified himself as the subject of three of the photographs that had been found in the vehicle (GXs 1-3), and petitioner stated that he had taken the photographs. Among the other photographs in petitioner's vehicle were ten (GXs 4-13) of a 17-year-old boy who, upon being located by Customs inspectors, stated that petitioner had taken the photographs and that petitioner had engaged in frequent sexual relations with him. E.R., Stipulation, at 1-5.

At trial, petitioner and his attorney signed a stipulation that recited the above facts. The stipulation then stated (E.R., Stipulation, at 5):

> 13. If called to testify, an expert for the government would state that photographs 1 through 13 depict minor children under the age of 18 engaged in "sexually explicit conduct," specifically a lewd exhibition of the genitals, as defined in Title 18, United States Code, Section 2255. Further, the photographs are obscene, and therefore prohibited from importation as provided by Title 19, United States Code, Section 1305, and in violation of Title 18, United States Code, Section 545.

The stipulation further stated (E.R., Stipulation, at 5-6) that petitioner "expressly recognizes the very strong likelihood that he will be found guilty of the charges contained herein." After recounting petitioner's recognition and waiver of various rights, the stipulation concluded (*id.* at 7):

> 18. [It is further stipulated t]hat this stipulation is being entered into by the defendant for the purpose of preserving for appellate review his pretrial motions and further, that the defendant does not contest for the purpose of appellate review, the sufficiency of the evidence in this case to sustain his conviction.

On February 20, 1985, the stipulation and the 13 photographs were admitted as the sole evidence on which petitioner's bench trial was to be based (Tr. 1, 8-9). The court conducted an extended colloquy with petitioner to determine his understanding of the rights he was waiving, his sentencing exposure if convicted, and the voluntariness of his waivers (*id.* at 3-8). Petitioner's counsel stated that "the stipulation that [he and petitioner] submitted to the Court is that Photographs 1 through 13 are obscene" (*id.* at 10). The district court thereupon adjudged petitioner guilty of both charges and specifically found that each of the photographs

was obscene and that each depicted minor children engaged in a lewd exhibition of the genitals (*id.* at 11).

2. The court of appeals affirmed (Pet. App. 1-10). The court declined to review the obscenity of the photographs, holding that petitioner was bound by the stipulation he had signed at trial (*id.* at 5).[1] The court also rejected (*id.* at 10) petitioner's double jeopardy attack on the imposition of consecutive sentences for violating 18 U.S.C. 545 (by violating 19 U.S.C. 1305) and 18 U.S.C. (Supp. III) 2252, finding that the two offenses constituted separate offenses under the test established in *Blockburger* v. *United States*, 284 U.S. 299 (1932). Finally, the court rejected (Pet. App. 7-9) petitioner's claim that his sentence was unduly and unconstitutionally harsh, concluding that it was within the range prescribed by statute and was justified by petitioner's background and by the expert testimony that had been introduced concerning the harm to pedophile victims and the unlikelihood of successful treatment for petitioner.

ARGUMENT

1. Petitioner first contends (Pet. 5-9) that the court of appeals erred in refusing to conduct an independent review of the 13 photographs at issue in order to determine whether they were obscene or constituted "child pornography" (*id.* at 9). This contention is meritless.

In obscenity cases and in other First Amendment cases, this Court has stated that appellate courts must make "an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected" (*Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964) (footnote omitted)). See *Bose Corp.* v. *Consumers Union*

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[1]The court noted that petitioner's claim of ineffective assistance of counsel could be considered only in collateral proceedings (Pet. App. 5).

of United States, Inc., 466 U.S. 485, 498-511 (1984); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963); *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946). The "independence" required, however, is independence from the binding effect of the fact-finder's conclusions, not from the litigants' own concessions. Independent appellate review is not required when the litigants voluntarily and knowingly stipulate that the material in question does not meet the standards for constitutional protection. Indeed, this Court has so held. *New York* v. *Ferber*, 458 U.S. 747, 774 n.28 (1982) (citation omitted) ("There is no argument that the films sold by respondent do not fall squarely within the category of activity we have defined as unprotected. Therefore, no independent examination of the material is necessary to assure ourselves that the judgment here 'does not constitute a forbidden intrusion on the field of free expression.' ").[2]

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[2] *Cote* v. *United States*, 413 U.S. 915 (1973), does not establish the contrary. The court of appeals in that case held that the defendant, having pleaded guilty to several counts of mailing obscene films, could not contest the obscenity of the material on appeal (470 F.2d 755, 756 (5th Cir. 1972)), but the court entertained, and rejected on the merits, the defendant's constitutional challenge to the statute involved, 18 U.S.C. 1461. This Court granted certiorari, vacated the judgment, and summarily remanded for further consideration in light of *Miller* v. *California*, 413 U.S. 15 (1973), and its companion cases, which changed the constitutional standard for determining whether a work is obscene. The *Cote* decision was one of nearly 80 summary remands for further consideration in light of *Miller* (see 413 U.S. 902-906, 909-916; 414 U.S. 953, 955, 961-962, 964, 966-967, 969, 992, 994).

The summary remand in *Cote* simply permitted the court of appeals to determine how *Miller*'s intervening change in the law would affect the court's judgment, including the validity of the defendant's guilty plea, which was made under pre-*Miller* law. In this case, there has been no intervening change in relevant legal standards, and there is no reason to look behind petitioner's concession.

Here, petitioner stipulated at trial to the obscenity of the photographs in question. The court of appeals found (Pet. App. 5) that petitioner had knowingly and voluntarily entered into that stipulation. Accordingly, the court of appeals correctly held petitioner bound by the stipulation and declined to review the obscenity of the photographs. See *United States* v. *Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986) (stipulations "freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions"); *United States* v. *Keck*, 773 F.2d 759, 770 (7th Cir. 1985) (stipulations as to material facts are facts conclusively proved); *United States* v. *Harding*, 507 F.2d 294 (10th Cir. 1974), cert. denied, 420 U.S. 997 (1975) (holding defendant on appeal to his stipulation at trial that the material in question was obscene); *Spillman* v. *United States*, 413 F.2d 527, 531 (9th Cir.), cert. denied, 396 U.S. 930 (1969).[3]

In any event, there was plainly a factual basis for finding that the photographs at issue in this case were obscene. In *Miller* v. *California, supra*, the Court stated (413 U.S. at 25 (emphasis added)) that government regulation could constitutionally extend to, among other things, "[p]atently offensive representations or descriptions of masturbation, excretory functions, and *lewd exhibition of the genitals*." See also *New York* v. *Ferber*, 458 U.S. at 765 (the " 'lewd

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[3]In *Clicque* v. *United States*, 514 F.2d 923 (5th Cir. 1975), on which petitioner relies (Pet. 7 n.3), the defendant pleaded guilty to mailing an obscene letter, but the letter was not reproduced or even described in the indictment, and the district court accepted defendant's plea solely on the basis of the indictment, without ever having seen the letter. On collateral attack of the conviction, the court of appeals held that the district court's acceptance of the defendant's guilty plea without first examining the letter to ascertain its obscenity ran afoul of the First Amendment. Here, by contrast, the district court received the photographs in evidence before finding them to be obscene and adjudicating petitioner's guilt.

exhibition of the genitals' " can render a work legally obscene). Contrary to petitioner's assertions (Pet. 4-5), the photographs here are not simply pictures of nude boys. Rather, the majority of the photographs focus exclusively on the boys' genitals, which, in some of the photographs, are in a state of full arousal and, in at least one of the photographs, are being fondled.

Finally, petitioner's claim that the court of appeals should have independently determined whether the photographs constituted "child pornography" (as well as their obscenity) is meritless. Whether the photographs are constitutionally unprotected child pornography is a question not in the case. Petitioner has never disputed that the photographs depicted minors engaged in sexually explicit conduct, specifically the lewd exhibition of the genitals, within the meaning of 18 U.S.C. (Supp. III) 2252. See also E.R., Stipulation para. 13 (quoted page 3, *supra*). And petitioner has never challenged the constitutionality of 18 U.S.C. (Supp. III) 2252. In any event, the photographs at issue plainly come within the statute's proscription, and the statute is plainly constitutional under *New York* v. *Ferber, supra.*

2. Petitioner argues (Pet. 9-12) that his consecutive sentences for transporting visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. (Supp. III) 2252, and for importing obscene photographs, in violation of 18 U.S.C. 545 and 19 U.S.C. 1305, constituted multiple punishment prohibited by the Double Jeopardy Clause. The court of appeals properly rejected this contention (Pet. App. 10).

The permissibility of cumulative punishments for the same conduct under the Double Jeopardy Clause is a matter of legislative intent. See *Ohio* v. *Johnson*, 467 U.S. 493, 499 & n.8 (1984); *Missouri* v. *Hunter*, 459 U.S. 359, 366,

368 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 343-344 (1981); *Whalen* v. *United States*, 445 U.S. 684, 691-693 (1980). The Court, moreover, "has consistently relied on the test of statutory construction stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two criminal provisions." *Ball* v. *United States*, 470 U.S. 856, 861 (1985). Under *Blockburger*, "[t]he appropriate inquiry * * * is 'whether each provision requires proof of a fact which the other does not.' " *Ball*, 470 U.S. at 861 (citation omitted). This inquiry focuses on the statutory elements of the offenses charged and not on the allegations of the indictment or on the government's proof at trial in a given case. See *Albernaz*, 450 U.S. at 337-338; *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

Here, as the court of appeals correctly concluded, the offenses of which petitioner was convicted each include at least one statutory element that the other does not. A violation of 18 U.S.C. 545 and 19 U.S.C. 1305 requires that the photographs be obscene, whereas a violation of 18 U.S.C. (Supp. III) 2252 does not (see H.R. Rep. 98-536, 98th Cong., 1st Sess. (1983)). A violation of 18 U.S.C. (Supp. III) 2252 requires that the photographs involve a minor, whereas a violation of 18 U.S.C. 545 and 19 U.S.C. 1305 does not.

Petitioner seeks to avoid this conclusion by arguing (Pet. 10) that every importation violation of 18 U.S.C. (Supp. III) 2252 is also a violation of 18 U.S.C. 545 because the latter statute prohibits importation of any merchandise "contrary to law." Petitioner's approach is misguided. Section 545, by its terms, cannot be viewed in isolation from a "law" defining importation restrictions. Accordingly, it is the combined elements of Section 545 and the incorporated law that define the statutory elements of the offense. Cf. *Whalen* v. *United States*, 445 U.S. at 694 (double jeopardy

analysis focused on the element of rape in a statute that covered rape and several other offenses as well). Here, the offense charged was the importation of photographs in violation of 19 U.S.C. 1305, which proscribes the importation of obscene material. Because that statute requires proof of an element that 18 U.S.C. (Supp. III) 2252 does not, the court of appeals correctly concluded that petitioner's consecutive sentences were permissible.

3. Petitioner finally contends (Pet. 12-14) that the district court, in pronouncing sentence, improperly took into account petitioner's homosexual relations with the boys portrayed in the photographs and that the resulting 15-year sentence was therefore disproportionate to the crimes of which he was actually convicted. This claim has largely been mooted, because the district court, on April 13, 1987, suspended petitioner's 15-year sentence and placed him on five years' probation. In any event, the court of appeals correctly held that the district court's consideration of petitioner's homosexual activity with two minors and the sentence were proper.

In determining the appropriate sentence in a particular case, a sentencing judge may consider a wide range of information concerning the defendant's background, character, and conduct. *Wasman* v. *United States*, 468 U.S. 559, 563 (1984); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *United States* v. *Givens*, 767 F.2d 574, 585 (9th Cir. 1985), cert. denied, No. 85-5490 (Nov. 4, 1985); *United States* v. *Lemon*, 723 F.2d 922, 932 (D.C. Cir. 1983). Here, the trial court heard extensive testimony on the characteristics and recidivist tendencies of pedophiles, as well as on the severe psychological and emotional injury that pedophile victims may suffer (Pet. App. 7). Petitioner himself stipulated that he took the photographs in question and that he engaged in sexual activity with the minors involved. This information was obviously relevant to petitioner's sentencing, since one of the central purposes of 18 U.S.C. (Supp.

III) 2252 was to combat the sexual exploitation of minors (see S. Rep. 95-438, 95th Cong., 1st Sess. 5 (1977)). In sum, the sentence that petitioner received is within the statutorily prescribed range, and it is not unconstitutionally excessive for conduct involving the sexual exploitation of minors (see *Solem* v. *Helm*, 463 U.S. 277 (1983); *United States* v. *Tucker*, 404 U.S. at 447; *United States* v. *Givens*, 767 F.2d at 585).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

WILLIAM F. WELD
Assistant Attorney General

DEBORAH WATSON
Attorney

JUNE 1987

No. 86-1747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ADOLF MEYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO THE BRIEF IN OPPOSITION

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No. 86-1747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ADOLF MEYER,

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INTRODUCTION

The petitioner, by counsel, responds to the Brief in Opposition filed by the respondent, the Government, and replies to specific contentions raised by the respondent.

STATEMENT OF FACTS

In the Argument portion of the Brief[1/] (p. 7), the Government contends

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1/ "Brief" refers to the Government's Brief in Opposition.

that one of the young males' genitals "are being fondled." The still pictures which each depict one male speak for themselves, and the argumentative characterization is without foundation. The young man in the still photograph is holding his penis at its base. Although the genitals are displayed, there is no action of a nature that could be described as sexual activity or "fondling."

At the hearings for release on bail pending appeal, the Government presented its only expert, a Los Angeles Police Officer with experience in a number of child molest cases whose testimony was contradicted by those with psychiatric and psychological training and experience. No evidence was presented about the police officer's experience in cases involving relations with males 15 and 17 years old with older man.

ARGUMENT

I THE REFUSAL OF THE FEDERAL COURT OF APPEALS TO REVIEW THE OBSCENITY OF THE MATERIALS THAT WERE THE BASIS OF CONTESTED LITIGATION WAS A JUDICIAL ABANDONMENT OF THE FIRST AMENDMENT AND VIOLATED THE PRECEDENT OF THIS COURT

The Government misconstrues the role of the federal judiciary in litigation directly concerned with First Amendment rights. The petitioner did not plead guilty nor did he abandon his rights by entering a conditional plea of guilty under Fed.R.Crim.P. 11(a)(2). The conditional plea of guilty might have narrowed the issues for review, and possibly excluded the review of the issue of "obscenity" or "sexually explicit conduct," but the parties in this case did not take that route.

Defense counsel at the trial presented the issue to the court with the expectancy that the court would not rule favorably on the issue. Counsel's opinion was not binding on the district

court's determination. In his waiver, the petitioner did not "contest for the purpose of appellate review, the sufficiency of the evidence in this case to sustain a conviction"[2/] but that concession as to the presentation offered by the Government in the form of its stipulation did not relieve the district court of its duty to make the required findings pursuant to Fed.R.Crim.P. 23(c) ("In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specifically.").

The district judge not only made the general finding of guilt but specifically found "obscenity" and "sexually

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2/ The stipulation as to the Government's expert's opinion as to "obscenity" and sexually explicit conduct" (Brief, 3) did not relieve the district court of its responsibility on the issue in the bench trial.

explicit conduct" as alleged by the indictment. The trial judge reached no more than the conclusion for the court did not engage in any **Miller** or **Ferber** analysis. The issue was squarely before the district court and expressly presented by the 13 photos incorporated with stipulation of the testimony and evidence that would be adduced in a trial. The district court was aware of the issue and specifically addressed it.

The Court of Appeals, to avoid the issue, relied upon the concession of defense counsel and alluded to a possible post-conviction petition for incompetence of counsel (a 28 U.S.C. 2255 petition). The decision of the Ninth Circuit eliminates the constitutionally required review mandated by this Court. By oath of office, all federal judges promise to <u>enforce</u> constitutional rights, specifically as

reinforced by the precedent of this Court.

Although the Government in its Brief (p. 6-7) argues "there was a factual basis for finding that the photographs were obscene," petitioner contends that was the required function of the Court of Appeals on the required direct review in a criminal case. Petitioner was entitled to the fair scrutiny required of the Court of Appeals, and his position is consistent with the principle of conservation of judicial resources as well as the implementation of established precedent. For the Court to accept the Government's argument that these photos are obscene is to excuse the Court of Appeals from its routine task and transfer it to this Court which engages in a much different type of review in determining whether to grant certiorari.

Federal criminal bench trials are not held merely as convenient accommodations of the parties; the judge had a duty to make a finding on the issues of obscenity and sexually explicit conduct. He did. The Court of Appeals should have reviewed those issues.

To determine the need for review by the Court of Appeals, this Court should review the specific photographs that are the direct basis of a 15-year conviction. The Court will see that these photographs do not meet the well-established requirements for "obscenity" and "sexually explicit misconduct."

The Court of Appeals avoided the issue. The photos in this case, privately possessed and without commercial value or intended value,[3/] are not "hard

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3/ The materials were examined when the petitioner entered the San Ysidro Port of Entry in a camper.

core" pornography unprotected by the First Amendment. A summary review of the photos will readily establish that they are protected by the First Amendment. Petitioner is entitled to have a federal appellate court review the evidence at the contested trial under the First Amendment standards set by this Court. Preferably, the petitioner would ask that that review be done by the Ninth Circuit, but if not, would ask this Court to conduct that required First Amendment review.

The petitioner was entitled to have an appellate court make "an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." (Jacobellis v. Ohio, 378 U.S. 184, 190 (1964)). (See also Government Brief, 4-5.)

II THE "CONTRARY TO LAW" PROVISION OF 18 U.S.C. 545 APPLIES EQUALLY TO 18 U.S.C. 2252(a)(1) SO THAT TWO OFFENSES MERGED FOR SENTENCING

The Government suggests the elements of the two statutes are the same except for the lack of an obscenity requirement in 18 U.S.C. (Supp. III) 2252 (sexually explicit conduct)[4/]. This is different than the "contrary to law" requirement of 18 U.S.C. 545. The Government prepared the pleadings in this case and referred to 19 U.S.C. 1305, but that allegation does not change the Congressionally created statute of 18 U.S.C. 545. Section 545 is a general statute and would permit the Government to use a number of other

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4/ This argument assumes the charge of "lewd" conduct in the indictment rather than "lascivious" as required by the statute was harmless error. The petitioner still contends that the 2252 violation as charged required a finding of obscenity.

laws to seek a criminal penalty. Congress had already specifically enacted a criminal penalty for importation of obscene material (18 U.S.C. 1462) (**United States v. 12,200 Ft. Reels of Film**, 413 U.S. 123 (1973)),[5/] but the Government chose not to use this specific statute (1462) but relied upon the general statute (545) which by its broad terms "contrary to law" of necessity included the Section 2252 violation. The pleadings in this case employed an unconstitutional and erroneous multiplication of the two offenses so as to permit the trial court to impose the maximum on each consecutively.

5/ This case, dealing with a 18 U.S.C. 1462 importation forfeiture, was remanded because of the summary dismissal and "no determination of the obscenity of the materials involved has been made." 413 U.S. 123, 129.

III THE PUNISHMENT IMPOSED BY A FEDERAL COURT MUST FIT THE CRIME FOR WHICH THE PETITIONER WAS CONVICTED AND NOT PUNISH FOR OFFENSES POTENTIALLY PUNISHABLE BY STATE AND FOREIGN AUTHORITIES

The 15-year sentence remains, but is now suspended. It is not mooted by the modification of the district court in granting structured probation (the conditions of which were not implemented because the INS deported the defendant for these offenses). The remainder of the 15 years confinement may be imposed if the petitioner violates probation. The petitioner's claim is not moot. **United States v. Campos-Serrano**, 404 U.S. 293, 294 n. 1 and 2 (1971) (defendant's deportation while on probation does not moot case).

The Court of Appeals created unlimited discretion for federal judges at sentencing by its refusal to insure the sanction is constitutionally appropriate to the offense charged. Due

process requires some correlation between the wrong done and the sentence imposed.

The other potentially criminal penalties which might be enforced in state jurisdictions was not the offense found here.

The Government also fails to note that Section 2252 until 21 May 1984 (Pub.L. 98-292) applied to importations "for the purpose of sale or distribution of sale," and the petitioner privately and confidentially possessed these materials. Given that the offense occurred on 30 June 1984 (CR 37:1-2), these actions of the petitioner would not have been in violation of that federal law.[6/]

6/ The district court dismissed earlier charges arising out of ex post facto application of section 2252. See United States v. Meyer, 602 F.Supp 1476 (1984).

This Court has a unique responsibility to oversee the federal judiciary in its application of discretion at sentencing. In addition to the constitutional requirement of due process to insure that the sentence is proportional to the charge (**Solem v. Helm**, 463 U.S. 277 (1983), the fundamental misapplication of discretion approved by the Court of Appeals here needs corrective action by this Court. There must be some limit to discretion, and the 15-year sentence to confinement for the 13 photos brought across the border at one time transgressed the legal, humane, and reasonable limits of discretion. The limit of sentencing discretion in federal cases needs clarification or at least the disproportionality here should be disapproved.

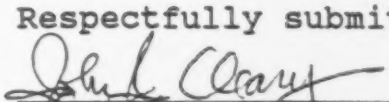
CONCLUSION

Because of the significant constitutional questions relating to obscenity

and sentencing raised by this petitioner, the Court is requested to issue a writ of certiorari to review this conviction. In the alternative, it is requested that certiorari be granted, the judgment vacated, and the case remanded to the Court of Appeals to conduct the review required by **Miller v. California**, 413 U.S. 15 (1973) and **New York v. Ferber**, 458 U.S. 747 (1982).

29 July 1987.

Respectfully submitted,



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